UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 22 Cr. 673 (LAK)

SAMUEL BANKMAN-FRIED,

Defendant. Conference
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New York, N.Y.
March 10, 2023
11:02 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: NICOLAS ROOS, ESQ.
DANIELLE R. SASSOON, ESQ.
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ALSO PRESENT: KRISTIN M. ALLAIN, Special Agent, FBI
LUKE BOOTH, Special Agent
TUNDE ADIJERAN, Special Agent

THE COURT: Good morning, everybody.

Okay. Well, I have the letters. Let me find out, first of all, what's going on about the discovery. So who's going to address that for the government?

MR. ROOS: I will, your Honor. Do you want me to speak from here or from the lectern?

THE COURT: Let's do the lectern, please.

MR. ROOS: So, your Honor, when we appeared before you for the initial arraignment back in January, Ms. Sassoon described the discovery and indicated that there was a substantial volume that we'd be in a position to produce quickly, largely productions of documents from third parties, either from subpoena returns or voluntary productions, as well as some information that had been seized, through search warrants and other legal process, and we did that in January. We produced all of the search warrants and affidavits that had been sworn out to date, which are obviously important for motion practice.

THE COURT: I'm sorry. All of the search warrants, something that would be important for ——

MR. ROOS: Search warrants and affidavits that would be important for motion practice, suppression motions. And we produced approximately 2 million documents, which represented the documents collected from third parties that the government had at that time.

Now Ms. Sassoon also described at that initial conference that this is a case that there was likely to be a substantial tail, in terms of ongoing discovery production, and that comes in really two forms. Number one is, the government's ongoing ——

THE COURT: Let me ask you a question before we go further.

MR. ROOS: Sure.

THE COURT: Is the production that you made in January a complete production as of the date you made the production?

MR. ROOS: The production we made in January was a complete production as of the date of production of search warrant —— of subpoena returns, search warrant applications, third-party voluntary document productions, but there are a few other things that were not produced at that time that I can get into relating to basically electronic devices.

THE COURT: Well, basically or exclusively?

MR. ROOS: Well, there's a caveat to really everything, your Honor. Mostly electronic devices. The reason I'm hedging is twofold. Number one, around that time we obtained a warrant for approximately 30 Google accounts, and so we got that right around then. That requires privilege review and also review for the responsiveness of the warrant, so that's something that's ongoing. And second is because the amount of information coming in to the government is constant

—— literally every day we get a production, a response to a subpoena or voluntary request —— for each discovery production we have to freeze in a moment of time. So literally when I tell a vendor, please stamp a million subpoena —— a million pages of subpoena returns, by the time they finish applying the Bates stamps, we now have another 50,000 pages. And so when I say we produced everything we had at that time, literally, by the time we're producing it, we already had a little bit more. But that's why we're doing ——

THE COURT: Let's call the "as of that time/date," the "effective as of that date," or "the effective date."

MR. ROOS: Yes, your Honor.

THE COURT: Okay? Whatever it is, the effective date. So when you produced in January, you had produced —— with the exception of electronic stuff, which we'll get to —— whatever you had as of the effective date; is that correct?

MR. ROOS: Correct, correct.

THE COURT: Okay. Now where does the Google production stand in relation to that?

MR. ROOS: Right. So I think, basically, as I see it, what remains, I'm going to put into four categories. Number 1 are those electronic devices, which I can give your Honor more detail on if you'd like.

THE COURT: We'll get to that.

MR. ROOS: Number 2 is the Google search warrant

return; Number 3 is the ongoing production of documents pursuant to subpoena; and Number 4 are sort of what I'll just call dribs and drabs. They are, you know, documents the government downloaded from the internet but are publicly available but we're going to give them in Rule 16 discovery; you know, reports maybe that —— from the FBI about the service of a search warrant, things like that. That's a very small amount. So principally, when we're talking about discovery, we're talking about three things, which are the Google, the devices, and then the ongoing production of subpoena returns that have come after the effective date. And I can go in whatever order your Honor wants.

THE COURT: Well, let's start with the electronic devices.

MR. ROOS: So the government produced some electronic devices in discovery in January, and there are five devices left, and the reason that those devices have not been produced or a subset of the material from those devices have not been produced ——

THE COURT: Well, it's the latter, right? It's not the former.

MR. ROOS: So certain of the devices —— three of the devices were obtained on consent, and so we intend to produce the entirety of the image of the device minus withholdings for privilege. So if the device holder had communications with

either counsel for the company or his or her individual counsel, we won't be giving those to Mr. Bankman-Fried because it's not Mr. Bankman-Fried's privilege, but we'll —— for those on-consent devices, we'll be producing everything else.

THE COURT: Okay.

MR. ROOS: And then there are two devices —— so there are three devices that fall into that category, and the holdup there is simply either the —— the extraction and processing —— these are large computers, people who do a lot of coding, and so they're not the type of thing you can plug in and just copy overnight, so the delays there have been the literal extraction of these laptops, and then the privilege review. And so that's three of the devices.

The two other devices were obtained pursuant to warrant. They are not the defendant's devices, they are the devices of a co-conspirator. Those have been processed electronically by the FBI, and they have gone through privilege review, and so we are in the stage —— the final stage, which is the responsiveness analysis, and we'll produce the subset of the materials responsive to the warrant to the defense.

THE COURT: When?

MR. ROOS: Well, both of those responsiveness reviews are fairly far along. One of them we were actually effectively done, although we recently realized there was an issue basically with how some of the information was rendered so I

think we probably need to go back, look at the underlying image, and that may take a few weeks, but I think we're sort of in the ——

THE COURT: All right. For the sake of discussion, so I can keep this straight in my mind and in my notes, let's call the three devices you got on consent searches, devices A, B, and C, and the other two that you got pursuant to a warrant, D and E, okay?

MR. ROOS: Correct.

THE COURT: So you are going to produce essentially a clone of the hard drives of A, B, and C, minus privileged documents, without regard to responsiveness or with regard to responsiveness?

MR. ROOS: Without regard to responsiveness because the device holders consented ——

THE COURT: So is the privilege review on A, B, and C done?

MR. ROOS: No. The privilege review on —— I'll say A is effectively done, just needs to be finalized. Privilege review on B and C is still ongoing. I'll say C literally just finished sort of the extraction process and so I think the privilege review has not begun on C. So A, almost done; B, in the middle; C, privilege review needs to start.

THE COURT: And what's the target date for production on A, B, and C?

MR. ROOS: Well, my hope, your Honor, would be in the next few weeks. Because these are laptops, there's sometimes issues, which is I'll say the case for device D, which I can get into, but —— but certainly since these are on consent and don't need to go through a responsiveness review, it shouldn't be —— this should not be a long process.

THE COURT: So we can rely on those being done in March, huh?

MR. ROOS: Yeah, I think so.

THE COURT: Now what about D and E?

MR. ROOS: So D is a laptop that was obtained pursuant to warrant. We did a review for privilege, which is done; responsiveness, which is largely done; there was a very large volume of documents within our review platform that basically looked like they were gibberish, thousands and thousands of these. It could be they are just system files that are in fact, you know, gibberish at least to a person just looking at them in a document review platform, but we want to double-check, since the defendant isn't getting the entirety of the device, so we're going to go back and look at that. But otherwise D is, for all intents and purposes, done.

THE COURT: So I would assume that can be produced in March also, right?

MR. ROOS: I think so. I mean, the only caveat I want to put on that one, your Honor, is just if that process of

going back, looking at the original image proves that there was —— something went wrong in terms of importing it into the document review platform, then there could be delays. But if your Honor wants, we can advise you and talk to defense if that happens.

THE COURT: What about E?

MR. ROOS: So E is a cellphone, and it's got a fairly voluminous volume. I guess that's redundant. The volume on it is substantial, your Honor. But I think we're fairly far along in the responsiveness review and we can complete that in March.

THE COURT: So it sounds to me like it perhaps is not as bad as I feared from the letter I got yesterday, I guess.

MR. ROOS: Well, I don't want to create a misimpression. We should talk about the Google return and then ——

THE COURT: Okay. So let's talk about the Google return.

MR. ROOS: So ——

THE COURT: What a good idea the internet was. I mean, I remember the days when a big document case was 400. And nobody ever had a lawsuit with more than four defendants because you couldn't make enough carbon copies.

MR. ROOS: Right.

THE COURT: I'm dating myself a little, huh?

Go ahead.

MR. ROOS: So, your Honor, the warrant —— the warrant itself and the affidavit have been produced to the defense. I flagged that just as your Honor is thinking about motion deadlines and motion practice.

THE COURT: Sure.

MR. ROOS: In terms of the actual return, Google has been producing it on a rolling basis. They've made five productions. Four of them I believe have been loaded to our relativity document review platform, the fifth one is in the process of being loaded now. So by early next week it may be loaded. Three of those four that have been loaded have gone through the privilege review. And so the two remaining —— the one that's been loaded but has not been privilege reviewed and the one that's still being loaded —— need to be privilege reviewed. The privilege review of the Google returns is a lot faster than it is of electronic devices because all the materials are just loaded into a review platform and then the filter team searches, for instance, Mr. Everdell's name in it and just excludes those documents.

So in terms of the Court's thinking, I don't think the privilege review should be a significant delay in the process. Rather, the issue is the return on the warrant yielded I think somewhere between 2-3 million documents, and those are subject to a responsiveness review since it's a warrant. So in order to move this along as quickly as possible, we're making a

production -- I think it will come out next week -- to the defendant of all of the emails in the email accounts that belong to the defendant, irrespective of a responsiveness review. We think he's legally entitled to the entirety of the accounts and so we're producing those, so he knows what we got back. And then we'll later give him a responsive set of both his -- the responsive materials within his accounts and the responsiveness materials from the other accounts that don't belong to him, for which I don't think he would have standing to litigate, but in any event, you know, of course we're still doing our responsiveness review as required by the warrant.

THE COURT: Now these five returns that Google has made to date, is Google done producing, or are they still rolling?

MR. ROOS: We think they're done.

THE COURT: Okay.

MR. ROOS: And let me also just explain that the five returns are not equal in size. It seems like they were sort of front-loaded. So the defendant's accounts, for instance, were in production 1, the latter productions are for other FTX or Alameda employees and are for sort of a smaller set of documents.

THE COURT: Okay. So when do you think you can finish, on Google?

MR. ROOS: So candidly, your Honor, I don't think that

will be done in March. I think —— I think April is a more realistic sort of time frame, and I think we can produce things on a rolling basis and we can also prioritize the review. For instance, we can prioritize the responsiveness review of the defendant's accounts first, which may make sense, as we're just thinking about a schedule for motion practice, and then sort of treat the other accounts afterwards.

THE COURT: Okay. And then we've had ongoing subpoena returns. Do you have outstanding subpoenas?

MR. ROOS: So, yes, your Honor. Obviously, as your Honor knows, the government has superseded in this case. We have ongoing investigations, not just with respect to the defendant; there's obviously four defendants on this particular docket. And so I think it's realistic to expect that we're going to continue to make productions that come in through —— by subpoena, past April. I think this is going to be a thing that keeps going, although I will say the volume is continuing to shrink. Obviously the first production was 1.7 million, the next one is around 287,000, and then it's going to keep getting smaller and smaller.

THE COURT: I think what I'm getting at is, are all the subpoenas on which you expect to get returns outstanding now or you're saying there is some material outstanding and that you'll be serving more subpoenas?

MR. ROOS: I think the latter; not necessarily

subpoenas directed at the defendant's conduct directly, although they would relate to potentially unindicted co-conspirators of the defendant for which we would, of course, have a Rule 16 obligation to produce the return.

THE COURT: Now are there any outstanding subpoenas where material is still due to come in?

MR. ROOS: So I think the one to flag, which is not actually a subpoena but is ongoing voluntary document production, is from FTX itself, and that's because the government made many requests for which FTX is continuing to produce either because they are continuing to find —— this is the estate, the debtor —— is continuing to find records or because we're making new requests of them as our investigation progresses. I think that's the most significant. There are other —— a handful of other categories, but they're things like, you know, a subpoena to American Express or some —— or to a bank, and so not sort of the same size and potential significance in the case.

THE COURT: Okay. Mr. Cohen, Mr. Everdell, who's going to deal with this? I just want to get your take on where the discovery stands and where it's likely to go.

MR. COHEN: Thank you, your Honor. I guess I'll start, and I may turn it over to Mr. Everdell.

The one point we raised in our letter, stepping back, is we've heard a lot of detail from Mr. Roos today and I think

we just have to see now. From the defense side, it sounds like we're going to get a lot of material in March, and maybe, you know, April, could mean early April or not, but we do appreciate the update he gave to the Court. The one thing that it strikes us does need to move is the motion schedule, in light of where we are in the discovery and also the superseding indictment. So ——

THE COURT: The discovery schedule you proposed in your March 8 letter, which you say is agreeable to the government, and I assume so, is fine with me.

MR. COHEN: Okay.

THE COURT: All right. What's not so fine is the possibility of a request to move the trial.

MR. COHEN: Right.

THE COURT: But you haven't made it and it's down the road. And all I'm saying is, don't get your hopes up. If I'm really totally persuaded you need it, obviously, but in cases like this, there's always an argument that you need it.

MR. COHEN: Of course.

THE COURT: We'll deal with that if and when you make it.

MR. COHEN: That's right. We're not making an application today. We were the ones who asked for the October trial date, and we still would like to proceed on that schedule. And by the way, we're not faulting the government

team here, but sometimes, as we all know, discovery does take longer than anyone anticipated, so we'll see what happens.

THE COURT: No, no. I'm extremely happy about the extent to which the lawyers on both sides are working cooperatively and amicably, and I wish it were that way in all my cases. It isn't, I can assure you.

Okay. So that takes care of the update on discovery, that takes care of the motion schedule, and that brings us to the bail conditions.

Now I received the proposal of March the 3rd, and looked at it carefully, I hope. And I've come to a broad conclusion and then a list of questions. The broad conclusion that I think I have reached —— and it's provisional —— is that even if we do all of these things and even if we modify this to address a series of questions that I still have, there is no hundred percent guarantee possible, in the sense that given the nature of the restrictions, the defendant's continued, though somewhat constrained, liberty, his residential circumstances, and the limits of the conditions, if he's determined and inventive —— and I suspect he's very inventive —— and technologically savvy, he could find a way around it, and conceivably not get caught. Harder, certainly. But does anybody disagree with that overall conclusion?

MR. ROOS: We do not disagree.

THE COURT: Mr. Everdell?

MR. EVERDELL: Your Honor, it is hard to give the Court a 100 percent ironclad guarantee with any set of bail restrictions. What I think we've proposed and I think that is a very good job of doing is restricting his access and his usage in a way that is extraordinarily meaningful and that can be tracked and, if there is a violation, can also reveal the violation very easily to ——

THE COURT: Well, that's true in part, but I'll get to all the ways that it could be evaded that I know of. But the proposal is he's going to have a flip phone, and so he can call up somebody and do verbally something along the lines of what he did in that text or email that we were all arguing about that I characterized as trying to achieve a choir singing out of the same hymn book. That's inescapable here if he has access to telephonic voice communication, right?

MR. EVERDELL: Well, your Honor, I would —— on that point, I would say that if that's the concern, using normal voice calls to call somebody inappropriately, the government I think could very well, and I'm sure they will, get a pen register on that phone number and know exactly who he's talking to, and there already is a "no contact" provision that limits the people he can actually speak to. And so that will be readily apparent in realtime to the government if they get a pen register.

THE COURT: That's a fair point, assuming that the

government knows all the relevant telephone numbers on the other end, right?

MR. EVERDELL: Yes, your Honor. It's —— yes. So there is always going to be I think some margin that ——

THE COURT: Right. But there's no way around it. I mean, if he calls a pay phone —— if there still is one —— in Salt Lake City by some kind of prearrangement and the person he wants to try to influence shows up at that pay phone at the appointed time, the pen register is meaningless, right?

MR. EVERDELL: Your Honor, I understand the Court's concern. Yes, the answer to that is yes. But I think in any situation, with any defendant, given any bail conditions ——

THE COURT: Always.

MR. EVERDELL: —— there's always that possibility.

THE COURT: But this defendant has given some pretty strong reasons. Pretty suspicious.

MR. EVERDELL: Yes, and I think we've countered those concerns with equally strong restrictions. So I think what we're looking for here, your Honor, is not a 100 percent guarantee, because there's just no way to give that guarantee, and nobody could do that. We're looking for what the least restrictive conditions are that will guarantee that he abides by the bail conditions, right, and the safety of the community is guaranteed. So ——

THE COURT: Those are two different things.

MR. EVERDELL: Yes, I understand. Well, the real standard is that he will —— the least restrictive conditions that will make sure that the community is preserved, is protected. It cannot be a 100 percent guarantee, but I think what we're striving for is a meaningful set of restrictions, which I think we've given the Court, and I'm happy to explain. If you want to talk in more detail about how these technologies work, happy to do it. I'm also joined in the gallery by David Sun, who's our technology consultant, who can provide a bit more detail if the Court wishes.

But that's what we're striving for. I think the conditions that we've imposed are extremely restrictive, and what they guarantee, your Honor, fundamentally is we have to balance the concerns that the Court has, I understand, with the defendant's need to participate in his defense, and quite frankly, your Honor ——

THE COURT: Of course that has to be done. I understand that.

MR. EVERDELL: Yes. And the other thing I would just point out, your Honor, is —— and I know the Court has to be satisfied itself, but we've talked about it at great length with the government, and they've consented to these conditions, and this has been a product of quite a bit of negotiation and discussion among ourselves and our respective technology consultants. This does represent I think a fairly inventive in

its own way and very restrictive way of restricting and controlling the defendant's access so that he can participate in his defense but also address the Court's concerns.

THE COURT: Let me raise then some of the other concerns.

And you don't have to answer this now.

MR. EVERDELL: Yes, Judge.

THE COURT: These don't address the possibility of someone else bringing a device into the house that the defendant could use. I think that needs to be addressed. And not just a computer but storage media, and there may be things I'm not thinking about. There's no restriction on taking files generated on what I'll call the approved device to refer to the proposed new laptop out of the house, where it could go to somebody who might cooperatively send out a whole bunch of emails or other documents to who knows where for who knows what purpose. I'm not entirely clear on who prepares this approved device, who verifies and certifies that it complies with the order, and who exactly it is who's supposed to do the monitoring, because our pretrial services team in the court is wonderful, but they would be the first to say they are not forensic cyber types.

Another point not addressed is, what happens to whatever devices he's got now? It's one thing to say he will only use the approved device; on the other hand, if the others

are still there, I don't know what happens. I don't understand whether there is any realistic way to restrict the use of Zoom as you propose it be limited. Maybe there is a way. I don't know enough to know whether there's a way to keep track of that.

And then a broader concern. And I'm not being critical of anybody by any means. I know you're working hard and trying to be as responsive as you can. The way this March 3 letter is framed, it for the most part is conceptual, as opposed to specifying exactly what hardware, what software, so that if I think it's appropriate, I can consult either pretrial services or an outside expert to see whether they agree that it does whatever you're effectively representing that it does, or has other problems. I'm not supposing that it does. I'm not suggesting bad faith. What I'm really saying is that if the four or five points I articulated as concerns were addressed in a satisfactory way and I were to approve the rest of what you've proposed conceptually, I don't have an order I can sign.

MR. EVERDELL: Yes, your Honor.

THE COURT: So I guess the next step is either to address the concerns I raised and then see if we're really all in the same place and postpone doing a proposed order until we get there, or go right to a proposed order, and that might be more work than it's worth if it's not going to do the trick.

MR. EVERDELL: Yes, your Honor. The Court raises some valid concerns. I think the best way to proceed is for us to take your Honor's points, work on them -- I think there are solutions to those questions. Let us work on it together and then come up with a proposed order for the Court that is, as you said, more specific.

One thing I would note, your Honor, in terms of the particular software that we plan to use, I'm happy to provide that information to the Court. I'm conscious of the fact that there are malicious actors out there who would love to know exactly what software we'd be using and how it's configured in order to try to hack these devices, and so I wonder if it's more prudent to submit those under seal to the Court.

THE COURT: That's a good point. I'm certainly, on the basis of what you said, prepared to do that. You, of course, are aware that other people will object to that if they wish.

MR. EVERDELL: We'll have to decide whether we meet the standard --

THE COURT: Yes, you're going to have to justify that.

MR. EVERDELL: Yes. And I will address -- I don't want to address the Court's concerns now. I think it's better if we --

THE COURT: Yes.

MR. EVERDELL: The one thing I will address is

Number 4, you said what happens to the defendant's devices that he has now. The plan there is for us —— the lawyers, his lawyers —— to take custody of those devices and take them out of the house. We can arrange something different if that's not satisfactory, but they would be away from him and not in his possession.

THE COURT: No. Okay. I trust you. You're professionals and officers of the court, and if you say you're going to segregate him from the machines, that works for me. But I want it in the order.

MR. EVERDELL: Yes, absolutely, your Honor. We'll get to work.

THE COURT: What else? Anything? I know you want some interim change, and I'll look at that.

MR. ROOS: I don't think anything else from us, your Honor. We'll work with the defense on your questions and a potential order.

THE COURT: Yes. I know you've asked me for an interim change with respect to access to the VPN for the database that you have that he needs to have in order to prepare, and in principle I'm prepared to do that, but it seems to me I need a more specific proposal.

MR. EVERDELL: Yes, your Honor. I think for that maybe we could also prepare a separate order for that one device and we'll specify exactly, to the extent we can

publicly, and we'll work that issue out separately, but we will specify what capabilities it has and what, how it's restricted, so the Court understands how it is ——

THE COURT: Right. I may well want to add to it some of the points that are in your March 8th letter that are not technical to broaden the interim production, because it was as if you were negotiating a trust indenture here, I feel like, and it takes time, you know, but we've got to have more relief pending the hopefully successful outcome. Okay. I will think about what those might be, but since you are, in principle, are agreeable to all of them as a quote-unquote final interim solution pending trial, I assume that whatever you've proposed here is okay in the short-term interim while we generate a new proposal.

MR. EVERDELL: Yes. So just so I'm clear what the Court is saying, whatever is proposed in this letter would be the interim bail conditions?

THE COURT: Maybe not all of them, but I might very well want to handle the question of anybody bringing equipment into the house, his transmitting anything out of the house, things like that, that don't involve software or monitoring or any of that stuff, but just make it a little tighter.

MR. EVERDELL: Right. So there will be actually two orders that we're going to give to the Court. The first is the immediate interim to deal with the laptop ——

THE COURT: Yes.

MR. EVERDELL: —— and a few other things ——

THE COURT: And, you know, access to the parents' machines. I mean, some of that stuff has to be in place very soon, like next week.

MR. EVERDELL: Understood, your Honor. Thank you.

THE COURT: Okay. Good. I think we're all in the same place, and I thank you. And I'll put something that gets docketed with the new motion schedule online. And have a good weekend.

ALL COUNSEL: Thank you, your Honor.

THE LAW CLERK: All rise.

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